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Supreme Court of the United States

OCTOBER TERM, 1918.

No. 714.

EUGENE V. DEBS,
Plaintiff-in-Error,
against
THE UNITED STATES OF AMERICA.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

BRIEF OF GILBERT E. ROE, AS AMICUS CURIAE.

GILBERT E. ROE,
As Amicus Curiae,
New York City.

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Preliminary Statement.

Upon the consent of the Solicitor General and the attorney for the plaintiff-in-error in the above entitled cause, the court has given me permission to file this brief as *amicus curiae*. I am attorney in the case of Nagler, plaintiff-in-error, against the United States, No. 778, present term of this Court, the record of which has been filed in this Court, involving the construction and constitutionality of Sec. 3, Title I of the Act of June 15, 1917, com-

monly known as the Espionage Law. Said cause will not be reached for argument, however, until after the above entitled action and others involving the same questions are disposed of by this Court. Because of my interest in other litigation involving the same questions as those involved in the above entitled case, I am peculiarly desirous of having called to the attention of this Court those authorities and suggestions which seem to me to bear upon the questions to be decided. I shall not discuss in this brief alleged errors peculiar to the record of this particular case, such as rulings respecting the admissibility of evidence or instructions given or refused. I shall discuss:

(1) The construction of Section 3 of Title I of the Act of June 15, 1917, commonly known as the Espionage Law.

(2) The constitutionality of said Section 3 of said act.

In my discussion of the constitutionality of the act, I shall call particular attention to the history of the constitutional provisions involved, as I take it for granted that counsel of record in this and other similar cases, will present the court decisions supposed to have a bearing upon the question. I have examined the record in the above entitled case sufficiently to determine that it fairly presents the questions I wish to discuss and shall make only such reference to it as may be necessary to illustrate and apply my argument.

ARGUMENT.

POINT I.

Section 3 of Title I of the Act of June 15, 1917, commonly known as the Espionage Law, was never intended to convert into a criminal act such public discussion of public matters as is contained in the articles set forth in the indictment in this case.

Sec. 3 of Title I of the act is as follows:

> "Whoever, when the United States is at war shall
>
> (1) Wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and
>
> (2) Whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or
>
> (3) Shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both."

I have inserted the numbers of the paragraphs in the above section in order to bring out more clearly the three distinct matters with which it deals.

The first paragraph of the section deals with the army and navy after they are organized and capable of military and naval *operations*. This paragraph makes it a crime for any one while the United States is at war wilfully to "make or convey false reports or false statements" for a certain purpose, and that purpose is "to interfere with the operation or success of the military or naval forces of the United States" or to promote the success of its enemies. The language *"make or convey"* is significant. What the framers of the Statute clearly had in mind was a situation where our army or navy was organized, disciplined and capable of military or naval operations, and a false statement or false report was conveyed to the army or navy, giving to the commander or commanders false information concerning the strength of the enemy, or some other military fact which would lead the army or navy or some portion of one or the other to engage in an *"operation"* which would not have been engaged in except for the false statement or false report. We may imagine some portion of our military forces in battle array facing the enemy or on the march and a false statement or false report is conveyed to the general in command, which leads him to retreat where he otherwise would have advanced, or to advance when if he had not been misled, he would have retreated.

This is the plain meaning of the paragraph, and the language is admirably chosen to express this meaning and nothing more.

The second paragraph of the section deals with the army in an earlier stage of its development, though it may also apply to the army when completely organized, and it provides that, whoever, when the United States is at war "shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty, in the military or naval forces of the United States" shall be punished, etc. Here, it is sought to guard the army from the danger, more serious I suppose while it was being organized than later, against mutiny and refusal of duty on the part of the soldiers, large numbers of whom it may be assumed were recently recruited; and here the section goes far and not only penalizes the act which shall cause "insubordination," etc., but it forbids the "attempt" to cause insubordination, disloyalty, mutiny or refusal of duty. This was intended to meet the case of a disloyal soldier or other person who went about in the camps or elsewhere "*wilfully*" that is with criminal purpose, attempting to cause mutiny or refusal of duty on the part of the soldiers, by bribery, falsehoods, intimidation or other unworthy means. The third and last paragraph of the section is the one which deals with the first stage of the army's development, to wit: its recruiting, and provides that whoever, when the United States is at war, etc., "shall wilfully obstruct (not *attempt* to obstruct) the recruiting or enlistment service of the United States to the injury of the service or of the United States, shall be punished," etc. In this last quoted paragraph at least these elements must appear:

(1) Actual obstruction of recruiting or enlistment service.

(2) Such obstruction must be to the injury of the service or of the United States; and

(3) Such obstruction must have been carried out wilfully, that is, not mistakenly, but through the evil purpose of hindering or preventing or retarding the building up of the army.

The framers of this Statute wisely assumed that when the draft law was put into operation and when the enlistment service was at its height, some friends and relatives of potential soldiers might urge and entreat them not to go into the service. So tender, I believe, was the law of these natural feelings of parents and other relatives that it was not intended to penalize such conduct unless it was carried to such length that it could be said to be done "wilfully." Mere *attempts* to obstruct, such as would arise from persuasion or entreaty or argument, in any form, was not penalized or attempted to be penalized. But besides all that, even though there was an actual obstruction, still before there could be a conviction, for violating the law it must be shown that the service, or the United States, suffered some loss or injury thereby. I suppose this provision requiring proof not only of actual obstruction to the recruiting or enlistment service, but also requiring proof that the United States or the service was actually injured thereby, was intended to provide for a case where by entreaty or persuasion, or appeals, some young man was for a time dissuaded from enlisting or responding to his country's call, but later, wiser counsels prevailing, he accepted service and performed well and faithfully whatever duty was required of him.

In such a case neither the United States nor the service was injured, and there could be no conviction under the law.

The foregoing is the plain, common sense meaning of the section of the Statute in question. This meaning is rendered, if possible, more clear, when the entire subject matter of Title I of the act is considered. The entire subject matter of Title I deals with overt acts directed against the military measures of the Government. Criminal statutes will be construed strictly, and all statutes will be so construed as to make them constitutional when this can reasonably be done. Had these elementary canons of construction been applied to the statute under consideration, there would have been little or no reason to complain of any conviction which would have occurred under it. As a matter of fact, owing to the manner in which this statute has been construed and applied, that class of discussion which has been indulged by the people of this country during all our other wars, whereby measures of Government have been freely criticised or condemned, has been almost entirely suppressed during the present war. It is easy to prove by reference to the foreign dispatches appearing in our newspapers published during the present war that while we have been waging this "war for democracy" on the continent of Europe, popular discussion of the war, its causes and its objects, has been suppressed to a greater extent in this country, than in the warring of Europe, and their guarantees of free speech and free press were certainly never supposed to be more solemn and binding than our own. The process by which this came about is most significant. A strong tendency was manifested on the part of the judges

before whom this law first came for construction, to uphold the inherent right of free speech and free press. The first case of which I have any information is that of U. S. vs. Baker and Wilhide in the United States District Court, for the District of Maryland, (247 Fed., 124) decided on July 11, 1917, by Judge Rose. Judge Rose, is admittedly one of the ablest judges of the country. The charge against the defendants in that case was that of making speeches and distributing literature to obstruct the operation of the draft law and discourage enlistment. The pamphlet distributed was the Socialist pamphlet entitled "The Price We Pay." Judge Rose, before the taking of testimony began in the case, said at the outset that he desired to make clear the issue and the only issue before the court. He said:

> "Anyone has a perfect right to any opinion he may see fit to form about any law that is proposed or about any law that is on the statute books. Any man may do anything, in itself legal, to secure the repeal of any law that is on the statute books. To that end he may make *any argument* that commends itself to his reason and judgment against the policy of any particular law, whether it be the law for selective draft or any other. And *he is not answerable for the wisdom of his arguments.* He could not very well be so answerable and put on trial even for the *good faith* of some of them. I am afraid if he could that most of the political orators in every campaign would be put on trial for the good faith of what they said about the other party."

After the testimony was in and in directing a verdict of "not guilty." Judge Rose further said:

> "You may have your own opinions about that circular; I have very strong individual opinions about it and as to the wisdom and fairness of what is said there. But so far as I can see it is principally a circular intended to get people to subscribe to some newspaper and to get recruits for the Socialist Party. *I do not think that we ought to attempt to prosecute people for that kind of thing.*"

Sometime after this decision, however, the same pamphlet came before another Federal Court, and the case was submitted to the jury and the defendants convicted. See

U. S. v. Pierce, 245 Fed. Rep., 878.

In the case last cited, the substance of the pamphlet is set out in the opinion and the learned judge in that case, referring to the pamphlet, said:

> "We have here not only a lurid and exaggerated picture of the horrors of war, possible and impossible, but many false statements calculated to *incite* opposition to the war and opposition to the Government and also *calculated to interfere with the morale of our army,* discourage enlistment, registration and willing service in our armies and encourage desertion."

I think the case next following in point of time the decision of Judge Rose, supra, was the de-

cision by Judge Learned Hand, in MASSES PUBLISHING CO v. PATTEN, 244 Fed., 535. The learned District Judge in that case laid down a rule respecting freedom of discussion, which would have allowed, if applied generally, considerable public discussion of war issues and aims. This case, however, was soon overruled by the Circuit Court of Appeals in MASSES PUBLISHING CO. vs. PATTEN, 246 Fed., 24. But the distinguished judges on the Circuit Court of Appeals bench seem not to have been in harmony concerning the meaning of freedom of speech or of the press.

There are several other decisions by District Judges not reported, in which a stand was made for the constitutional right of free speech and free press. One notable case reported is that of U. S. vs. HALL, 248 Fed., 150. But soon the current of decisions set strongly in favor of the Government in all prosecutions under this law until substantially all hostile criticism of every measure even remotely connected with the war was suppressed through the punishment of those who attempted to indulge in such criticism. I think it will be found, that even the Bulletins issued by the Department of Justice reporting such espionage law cases as it chose to report, will fully sustain the above statement. I note, also, that in the Annual Report of the Attorney General of the United States for the year 1918, reference is made to a number of prosecutions under Sec. 3 of Title I of the Espionage Law, and it is stated that some of these cases are referred to as an illustration of a "dangerous type of propaganda" which was punished.

Whether or not the Federal Congress, with its strictly limited powers, has the right to declare

any discussion of the measures of Government to be *dangerous propaganda* and so suppress it, is the question to which I shall invite the attention of the court under my next point. That it attempted to exercise such power is shown by the amendment of Sec. 3 of Title I of the Espionage Law, passed and approved on May 16, 1918. That amendment, so far as is material, is as follows:

> "Sec. 3. Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States, or to promote the success of its enemies, or *shall wilfully make or convey false reports or false statements, or say or do anything except by way of bona fide and not disloyal advice to an investor or investors, with intent to obstruct the sale by the United States of bonds or other securities of the United States or the making of loans by or to the United States,* and whoever, when the United States is at war, shall wilfully cause, or attempt to cause, *or incite or attempt to incite,* insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct *or attempt to obstruct* the recruiting or enlistment service of the United States (to the injury of the service or of the United States) *and whoever, when the United States is at war, shall wilfully utter, print, write or publish any disloyal, profane, scurrilous, or abusive language about the form of government of the United States, or the Constitution of*

the United States, or the military or nav
forces of the United States, or the flag of t
United States, or the uniform of the Army
Navy of the United States, or any languag
intended to bring the form of government
the United States, or the Constitution of t
United States, or the military or naval force
of the United States, or the flag of the Unite
States, or the uniform of the Army or Nav
of the United States into contempt, scorn, co
tumely, or disrepute, or shall wilfully utte
print, write or publish any language intende
to incite provoke or encourage resistance t
the United States, or to promote the cause o
its enemies, or shall wilfully display the fla
of any foreign enemy, or shall wilfully by u
terance, writing, printing, publication or la
guage spoken, urge, incite, or advocate any cu
tailment of production in this country of an
thing or things, product or products, neces
sary or essential to the prosecution of th
war in which the United States may be en
gaged, with intent by such curtailment to crip
ple or hinder the United States in the prose
cution of the war, and whoever shall wilfull
advocate, teach, defend, or suggest the doing
of any of the acts or things in this section
enumerated, and whoever shall, by word or ac
support or favor the cause of any country with
which the United States is at war or by word
or act oppose the cause of the United State
therein, shall be punished by a fine of no
more than $10,000 or imprisonment for no
more than twenty years, or both."

The language added by the amendment in the
above quotation is printed in italics, and the clause

inclosed in parenthesis is found in the original act and not included in the amendment.

The above amendment to the Espionage Law is important because it no more abridges freedom of speech and of the press than is done by the conviction of the defendant in the present case, and of other defendants in scores of other cases under the law before it was amended. If such convictions do not violate any constitutional *right*, then the above amendment to the Espionage Law does not violate any constitutional *provision*. For example, under the original Sec. 3 of Title I of the Espionage Law, convictions have been had, upon the following charges, among many similar ones.

Saying in a speech that anyone who enlisted for service in France would be used for fertilizer and that was all he was good for.

O'Hara Case, District of North Dakota, Department Bulletin No 49.

For saying in a speech that the entrance of the United States into the war was unjustified and that Germany's submarine warfare was proper.

Wolfe Case, District of South Dakota, Department Bulletin No. 81.

For writing a letter stating that Germany's agreement to discontinue unrestricted submarine warfare was conditional and not absolute.

Perley Doe Case, District of Colorado, Department Bulletin No. (Report of Attorney General, 1918, page 49).

Criticising, in anger, the financial manage
of the Red Cross and Y. M. C. A. in connec
with the war work.

Nagler Case, Western District of Wi
sin, (Annual Report of Attorney
eral of U. S., 1918, page 52).

The present case, as well as any, illustrates
principle upon which convictions are obtaine
this case, the defendant was convicted for
lishing an article on the 7th day of Febru
1918, in a newspaper criticising the Senate of
United States for not stating that our war
did not include the conquest of territory for
benefit of the allies, and by inference, critici
or disagreeing with the President for appare
giving support, in his address of January 8, 1
to the allies' territorial claims. (See first c
of indictment, page two of record.) The s
jury acquitted the defendant for publishing a
ticle in the same paper on March 7, 1918, ch
ing that our big financial interests and the No
cliffe-Wall Street press was trying to prolong
war in oposition to the President's efforts fo
early and honorable peace. (Second count of
indictment, page 3 of record.) But both co
were submitted to the jury and if either would
tain a conviction, both would do so. Now, I
spectfully but most emphatically submit, that
ting the worst possible construction on the
ticle set forth in the first count of the indictm
and for publishing which, this defendant
been sentenced to four years in prison, no n
can be honestly and intelligently said of it b
juror or anyone else, to sustain the prosecuti

case, than that it contains language which, if brought to the attention of some person whose mind was open to its influence, might have a tendency to make such person disapprove of our war aims, as stated by the President without dissent from the Senate. Whether such approval, if it ever was caused by the article in the mind of this hypothetical person, would then manifest itself by any shrinking from duty or hesitation about complying with any requirement of the law, is a purely psychologic question which no man can answer, for the answer depends entirely upon the mental and moral characteristics of this particular person, whom, we assume, first, might have seen the article, and, secondly, might have been in some manner influenced by it. The fact that the learned trial judge charged the jury that they must be satisfied "that the language not only naturally but necessarily deterred and hindered men from enlisting in the service of the country" (page 77 of the record) does not change the nature of the language used or the purely speculative character of the inquiry concerning the possible effect of the language upon some person who might possibly read it. To say that the language of the article *"necessarily deterred and hindered men from enlisting in the service of the country"* is to permit a jury to exercise powers which will enable it to hang a man any time for a speech or an editorial. If a jury can be permitted to say that the argument in this article necessarily hindered men from enlisting, then it is competent for a jury to find that the article complained of, or some other, necessarily drove men into the ranks of the enemy, or necessarily caused men to commit murder, or any

other crime. The most that any jury or any judge can say about any language of a speech or article in the absence of any evidence that it produced a particular effect, is that it would have a tendency to produce the results complained of, and that is the manner in which the instructions have been given in most of the cases prosecuted under Sec. 3, Title I of the Espionage Law. Now, of course, if this conviction can be upheld because the article has the tendency to produce the result complained of, then Congress can pass a valid law which directly provides that the use of language in a speech or article having the tendency to produce the results complained of, shall constitute a crime. Congress can certainly do directly anything that it can do indirectly, and if it can pass a law under which this defendant can be validly sent to prison for four years because of the publication of the editorial set out in the first count of this indictment, then it can, in specific language, make the publication of that editorial a crime. In other words, if this conviction can be upheld, then Congress can expressly declare that the publication of an article, or the use of language in a speech which has a tendency to influence the mind of any person against enlisting in the army, or doing any other thing which Congress may prescribe, is a crime punishable as the Congress may direct. That such limitation upon public discussion, whether accomplished directly by Congress through an act which frankly declares its purpose, or indirectly by permitting a jury, without evidence, to draw the conclusion that general public discussion of measures of Government cause injury to the United States by obstructing enlist-

ments, is unconstitutional, is the proposition to which I invite the attention of the court.

POINT II.

Section 3, of Title I of the Act of June 15, 1917 (commonly known as the Espionage Law) is unconstitutional, if construed and applied so as to punish any individual for speaking or publishing his opinions on any measures of the government.

The First Amendment to the Constitution proposed to the legislatures of the several states by the First Congress, on the 25th day of September, 1789, provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

In this brief, I shall consider only the limitation upon the power of *The Congress of the United States* to abridge freedom of speech or of the press. What the states may do in that matter, or what the people themselves might do, are questions quite aside from the present discussion, and in my opinion the hopeless confusion shown by the recent decisions under the Espionage Law, and the absurd results reached in many cases, has arisen by reason of the failure to keep in mind the fundamental limitations upon the power of the Federal Government as expressed in the Constitution.

It is familiar law, of course, that the Federal Government, including the Congress, has no power, except it is one plainly delegated to it by the Constitution. Whenever the Congress of the United States passes a valid law, it must be possible to turn to the Constitution of the United States and find the authority for such law, and if the authority does not exist in the Constitution, the law is void and is no law.

That there might be no question about this, the Tenth Amendment specifically provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The debates in the Constitutional Convention and in the conventions of the several states when the Constitution was up for ratification, show that the rule of constitutional construction, afterwards made famous by Chief Justice Marshall, was anticipated. Hence it was, that in order to protect certain subjects from ever being drawn within the jurisdiction of Congress under the theory of implied powers, some subjects were by the First Ten Amendments removed absolutely from Congressional consideration. Among these are freedom of speech and of the press, peaceable assembly, the right to petition the government, the free exercise of religion, the right to keep and bear arms, freedom from unreasonable searches and seizures, jury trial and many others.

To illustrate: Section 8 of Article I of the Constitution, provides that, "The Congress shall have power to lay and collect taxes, duties, imposts and

exercise." Also, "to borrow money on the credit of the United States." Now, suppose Congress should undertake to lay a very burdensome tax, and one popularly regarded with disfavor, or should propose to borrow money on terms or for a purpose of which the people disapprove. Congress might well say that it was necessary or at least very proper to suppress public condemnation of such policy; nor would it be difficult to conceive of a crisis in the life of the Nation, where the urgency for money was so great and immediate, that the purpose of Congress, highly patriotic and praiseworthy as it might be under the circumstances, would be entirely defeated by the public clamour which could be raised against its action, either before such action crystalizes into law, or afterward.

It is at this point that the First Amendment comes in and provides specifically, that "Congress shall make no law * * * abridging the freedom of speech or of the press." The prohibition is absolute. If Congress cannot borrow money without abridging the freedom of speech or of the press, then the money will not be borrowed; if it cannot lay and collect taxes without abridging freedom of speech or of the press, then the taxes cannot be laid or collected. Again, the Congress is given the power "to declare war; * * * to raise and support armies; * * * to provide and maintain a navy." In order to carry out these express grants of power, it might well be argued that it would be reasonable and necessary and proper to suppress hostile criticism of Congress respecting some or all of these matters during the period of the war. But the framers of the Constitution foresaw this possi-

bility, and the debates, particularly in the Virginia Convention called to ratify the Constitution, shows that they foresaw it, and so it was declared in the First Amendment, that "Congress shall make no law * * * abridging the freedom of speech or of the press," and if, for example, an army cannot be raised without abridging freedom of the press, the army will not be raised, and an army ought not to be raised unless it can be done in spite of every reason that can be urged against it.

In other words, our historic freedom of speech and of the press, is to remain inviolate. It accompanies every act of the Congress of the United States, whether in peace or in war. Whatever express power the Constitution may confer upon the Congress must be exercised by it without abridging freedom of speech or of the press, and if an express power cannot be exercised as efficiently as desired, because of the inability of Congress to abridge freedom of speech or of the press in the slightest degree, then that is a limitation upon the power of Congress, which the Constitution has placed there, and which the Courts must recognize and uphold.

I shall not in this connection, enter upon a discussion of the wisdom of the constitutional provision forbidding Congress ever to abridge freedom of speech or of the press, with the consequent limitation upon the other powers of Congress thereby involved, but it would not be difficult, I think, to prove that of all the provisions of the Constitution, this is the one most calculated to preserve our free institutions to ourselves and to posterity.

Under Point I, I have shown how the majority of the Federal District courts of this country, in

their interpretation of Section 3, Title I of the Espionage Law, and the Congress itself in its amendment of May 16, 1918, to the Espionage Law, has clearly yielded to the temptation under the exigencies of the war to strike down and destroy the free speech and free press clause of the Constitution, in order, as it was believed, that the war making powers of the Government might be more effectively carried into execution. It is not to be expected that the Congress or the courts would declare or admit that the action taken had abridged freedom of speech or of the press, and it is undoubtedly true that there was no purpose either in the Congress or the courts to accomplish that result. But if the breach already made in the wall of constitutional liberty is not speedily and permanently repaired, it will certainly be enlarged as one exigency after another seems to make it necessary, until the whole structure will give way before the assaults of real enemies of constitutional and democratic government. The country needs to be reminded by this Court at the close of the present world war, even as it was reminded at the close of the Civil War in the great Milligan case (71 U. S., 2, 120) that, "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection, all classes of men, at all times, and under all circumstances."

In what I have thus far said, I have assumed that the express denial to Congress in the First Amendment of any power under and circumstances to abridge "the freedom of speech or of the press," protected the people at all times against any interference by Congress with their right to speak

or publish their opinions on any and all measur of government.

If my assumption is correct, then it must fo low that the conviction in the present case and all Espionage Law cases dependent upon like pri ciples, must be set aside, either because the la is unconstitutional or has been erroneously a plied.

I will now proceed to demonstrate the absolu correctness of the assumption I have made.

FREEDOM OF SPEECH AND OF THE PRES DEFINED.

It has never been my good fortune to read a d cision of a court or a brief of counsel which ha undertaken to interpret the free speech and fre press provision of the First Amendment to th Constitution in the light of all those historica facts immediately preceding and following th adoption of that amendment, although those fact show beyond cavil or question exactly what wa understood by the authors of that provision whe it was adopted, and exactly what it was intende to accomplish by its adoption. On the contrary the historical data seems to have been largel overlooked or disregarded, and expressions o opinion of English judges and law writers, whic could have at best only a remote bearing on th question, have been laid hold of by the courts and cited in each succeeding decision through th years, until an interpretation has been given t that provision of the Constitution by many abl courts and law writers, which renders it utterl useless as a guarantee of liberty of any sort what soever.

Almost every decision dealing with the free speech and free press clause of our Constitution, quotes, as though it were authority, Mr. Justice Blackstone's statement that a free press consisted

> "in laying no previous restraint upon publications, and not in freedom from censure of criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public, but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity."
>
> Blackstone's Commentaries, Book 4, page 151.

In one form or another, this statement of Blackstone has found its way into our decisions, until it has been cited by many courts and lawyers as a correct interpretation of the free speech and free press clause of our Constitution.

Mr. Justice Backstone died in 1780, about ten years before the First Amendment to the Constitution was adopted. He wrote the last volume of his Commentaries in 1769, about twenty years before the free speech and free press clause of our Constitution was adopted, and before any one had ever thought of framing the Constitution. In the sentence quoted, he was simply dealing with the condition of the press in England, as it had existed since the repeal of the Licensing Act in 1694. Free speech was not involved in the discussion at all, and free press only according to Justice Blackstone's view of what was right and proper in Eng-

land since the repeal of the licensing acts
one hundred years before.

Mr. Justice Blackstone also believed in w
In his Commentaries, he said:

> "To deny the possibility, nay, actual
> ence of witchcraft and sorcery, is at once
> to contradict the revealed will of God in
> ous passages of both the Old and New
> ment, and the thing itself is a truth to
> every nation in the world hath in its
> borne testimony, either by example seen
> well tested, or by prohibitory laws whi
> least supposed the possibility of com
> with evil spirits."

Blackstone's Commentaries, Book 4, C
4, Page 60, Ed. 1860.

Mr. Justice Blackstone's belief in the fortu
condition of the English press after the repe
the licensing acts in 1694, like his belief in w
craft, have a historical interest, but there i
more reason for accepting his beliefs about
than about the other as a measure of liberty
freedom in this country today. Judge Blacks
as the events of his life prove, and as his in
tial critics state, was a conservative of co
vatives; his advancement in life was due as n
to his ability to commend and defend whatever
isted, as it was to the possession of other tal
He "was conservative almost to rigidity" (Step
Dictionary of National Biography, pages 133-1
There is no reason to doubt that whatever
dom the English press had won before the a
tion of our Constitution, as for example the re

of the licensing acts, or rather the expiration of the licensing acts, was intended to be preserved under our Constitution, but it is a strange doctrine that it was to be the measure of the freedom of the press claimed by the Colonies. It would at least be as probable in the absence of any other evidence, that this provision of the Constitution, like others, was adopted to destroy British tyranny. rather than to perpetuate it. It would be strange if our boasted freedom of the press only involved the right to publish a statement without first submitting it to a censor, but with the liability of being executed or imprisoned for life because of the publication. Yet that is all that Blackstone's definition of the freedom of the press amounts to. Under the old English laws against seditious libel and blasphemy, the unfortunate publisher was better off with the censorship than without it. Under the censorship he could at least know in advance what he could not publish, but without it, his first intimation that he had done wrong usually came when he was hailed before some tribunal to be punished for a publication which he had supposed was innocent, and as in some of the provisions of our Espionage Law, the truth was no defense.

A history of the contest for freedom of speech and of the press in England, more extensive than I can undertake to give in this brief, will show that in that country both before and after the repeal of the licensing acts, there were two parties, one contending for absolute freedom of the press, and the other opposed to it.

Mr. Justice Blackstone was one of the distinguished members of this latter class. The same

contest was carried into the Colonies, and i
the views of those who stood for absolute fr
of speech and of the press, *as against any*
by the Federal Government, that finally pre
and was written into the Constitution.

That is what I now proceed to show
historical sources.

1. THE ADDRESS BY THE CONTINEN CONGRESS TO THE INHABITANTS QUEBEC.

The first document to which I call attenti
an address issued by the Continental Congre
October 28, 1774. That Congress, the repres
tive of all the Colonies, voicing their sentin
and expressing their ideas issued a public ad
on the 28th of October, 1774, directed particu
to the inhabitants of Quebec, which set forth
rights and grievances, and among others the
lowing:

> "The last right we shall mention, reg
> the freedom of the press. The importan
> this consists, besides the advancement
> truth, science, morality and arts in gen
> in its diffusion of liberal sentiments on
> administration of government, its ready
> munication of thoughts between subjects,
> its consequential promotion of union an
> them, whereby oppressive officials are sha
> or intimidated into more honourable or
> modes of conducting affairs."

(See *Journal of the Continental*
gress, Vol. 1, page 108, Ed. 1904.)

Note well the language, "whereby oppressive officers are *shamed or intimidated* into more honourable and just modes of conducting affairs." Clearly the Continental Congress believed in a press not only free enough to *shame* public officers for their misconduct, but when necessary, to *threaten* them as well.

2. THE VIRGINIA RESOLUTION OF TOLERATION.

Passing now over a period of ten years, we come to a document of the greatest importance on this subject. In 1784, the House of Delegates at Virginia, had under consideration, a bill providing for the teaching of the Christian religion. This bill was strenuously opposed both by Mr. Jefferson and Mr. Madison, and was not acted upon at that session of the Legislature, but at the next session a bill drafted by Mr. Jefferson was passed in its place, after extended discussion. This bill was passed in 1785, and is found as Chapter 34, Vol. 12 of Hening's Statutes at Large. While it dealt more particularly with religious freedom, it applied to secular freedom as well, for it must always be remembered that the early struggles concerning the freedom of speech and of the press, was largely a contest for the right to express religious sentiments which might be regarded as heretical or unorthodox.

This Act starts with the declaration:

> "Almighty God has created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapaci-

ties, tend only to beget habits of hypocrisy and meanness."

It then proceeds:

"To suffer the civil magistrate to intrude his power into the field of opinion, or to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all liberty, because he, being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own. *It is time enough for the rightful purpose of civil government for its officers to interfere when principles break out into overt acts against peace and good order.*"

The italicized portion of the above quotation, is a description of freedom of speech and of the press, applicable alike to religious as well as to secular subjects. Thoughts or words or principles were not to be punished by the magistrate, but it was only when an overt act arose out of them, that government could rightfully interfere.

In *Reynolds* vs. *United States,* 98 U. S., 145, at page 163, this Court had occasion to consider this resolution in connection with the religious freedom guaranteed along with freedom of speech and of the press in the First Amendment. Chief Justice Waite, in the opinion in that case, after showing Mr. Jefferson's connection with the resolution, accepts it almost as an authoritative declaration

of the scope and effect of the First Amendment to the Constitution, so far as it relates to religious liberty. He said (page 164):

> "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach *actions* which were in violation of social duties or subversive of good order."

If I can show from equally unimpeachable historical sources, that Mr. Madison and Mr. Jefferson held exactly the same views as to the limitation imposed upon the power of Congress by the free speech and free press clause of the First Amendment, as they did concerning the limitation on the power of Congress imposed by the clause of the said amendment providing for freedom of religion, then we must be entitled to have their views accepted as equally authoritative in both cases. That this was the view of Mr. Madison and Mr. Jefferson, is clearly shown by the historical facts to which I will now refer.

3. THE RESOLUTIONS OF THE VIRGINIA CONVENTION OF 1788.

As pointed out in the *Reynolds case, supra*, Mr. Jefferson was in France at the time the Federal Constitution was adopted, and so did not participate, personally, at least, in the deliberations of the Constitutional Convention. He objected to the Constitution, however, when he saw a draft of it,

because it did not contain a bill of rights. When the Constitution came up for ratification in the Virginia Convention of 1788, Mr. Jefferson was still absent, but the debates in the Convention show that his friends voiced his sentiments respecting the Constitution, and particularly as to his desire that it should contain some guarantee regarding freedom of speech and of the press, and while he was reported to be in favor of adopting the Constitution, he thought it should be done with the understanding that the necessary amendments would be promptly proposed and adopted, and as we all know, that was the policy pursued, which resulted in the adoption of the first ten amendments to the Constitution.

Governor Randolph, in answering the charge of Patrick Henry that the Federal Constitution did not provide for the freedom of the press, said:

> "The liberty of the press is supposed to be a danger. If this were the case, it would produce extreme repugnancy in my mind. If it ever will be suppressed in this country, the liberty of the people will not be far from being sacrificed. Where is the danger of it? He says that every power is given to the general government that is not reserved to the States. Pardon me if I say the converse of the proposition is true. I defy anyone to prove the contrary. Every power not given by this system is left with the States. This being the principle, from what part of the Constitution can the liberty of the press be said to be in danger?"

(See *Debates of Virginia Convention*, 1788, *Vol.* 2, *page* 11.)

Governor Randolph's argument on this point, was of course, unanswerable, if the only fear was that Congress might establish a censorship of the press similar to the English licensing acts. But this was not the danger apprehended. The real danger, as was pointed out in the debates, would arise from the doctrine of implied powers by which freedom of speech or press might be in some manner interfered with, in order more easily or expeditiously to carry into effect some express power given to Congress by the Constitution. The friends of free speech and of free press in the convention, anticipated in substance, the rule of constitutional construction afterwards made famous by Chief Justice Marshall, when he said:

> "Let the end be legitimate; let it be within the scope of the Constitution, and all means which are appropriate, which are adapted to that end, and *which are not prohibited* but which consist with the letter and spirit of the Constitution, are constitutional."
>
> McCullough vs. Maryland, 4 Wheaton, 415, 430.

So it was that the friends of free speech and free press, who thought an express declaration on the subject necessary, were successful, and in the very resolution by which the Constitution was ratified by the Virginia Convention, it is provided:

> "We, the Delegates of the People of Virginia, * * * declare that * * * among other essential rights, the liberty of conscience and of the press cannnot be cancelled, abridged,

restrained or modified by any authority of the United States."

The Virginia Convention also adopted a Bill of Rights which it asked to have submitted as a part of the Constitution, and the 16th Article thereof provided:

> "That the people shall have a right to freedom of speech and of writing and publishing their sentiments; that the freedom of the press is one of the greatest bulwarks of liberty, and ought not to be violated."

Can it be said that the right of the people to freely speak and publish their sentiments would exist, if the Congress of the United States was to have power to punish, by such penalties as it might choose, the speaking and publishing of such sentiments as it might declare interfered with or might interfere with the functions of the Federal Government? Plain as the answer to the above question is on principle, it is not left to inference as appears from the facts to which I now call attention.

4. THE SEDITION LAW OF 1798.

In July, 1798, during the administration of President Adams, the law commonly known as the Sedition Law was passed. The reason commonly assigned for the passage of the law, was the strained relations existing at that time between this country and France, and the popular excitement and unrest incident thereto. So far as here material, that law provided:

> "If any person shall write, print, utter or publish any false or malicious writing against

the Government of the United States, or either House of Congress, or the President, with intent to defame them, or either of them, or to bring them or either of them into contempt or disrepute, or to excite against them or either of them the hatred of the good people of the United States, then such person being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding $2,000 and by imprisonment not exceeding two years."

(Laws of 5th Congress, Chap. 91.)

Whatever likeness or unlikeness this first Sedition Law bears to the present Espionage Law, they have this in common: They were both laws passed by the Federal Congress, and in their operation (according to the interpretation given to the Espionage Law by the majority of the Federal Courts) both operate to protect the acts of the Federal Government, which really means the Administration in power, from hostile criticism and condemnation. While the sedition law of 1798 never came before this Court, it was repudiated as unconstitutional by the people themselves, in a series of Acts, which, though not absolutely binding on this court, certainly must be very persuasive.

5. THE KENTUCKY RESOLUTIONS OF NOVEMBER, 1798.

What are known as the Kentucky resolutions, were prepared by Mr. Jefferson, after consultation with Mr. Madison, and were adopted by the Legislature of Kentucky.

(See Jefferson's letter to James Madison, Nov. 7, 1798, containing draft of Kentucky resolutions, Vol. 4—Jefferson's Complete Works, page 258; see, also, Mr. Jefferson's letter to J. C. Breckenridge, Dec. 11, 1821, Vol. 7—Ford's Compilation of Writings of Thomas Jefferson, page 290).

The Virginia resolutions to be presently noticed, adopted shortly after the Kentucky resolutions, were prepared by Mr. Madison. The Kentucky resolutions so far as here material, were as follows:

"Resolved that it is true as a general principle and is also expressly declared by one of the amendments to the Constitution that 'the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people'; and that no power over the freedom of religion, freedom of speech or freedom of the press being delegated to the United States by the Constitution, nor prohibited by it to the states, all lawful powers respecting the same did of right remain and were reserved to the states or to the people; that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed; and thus also they guarded against all abridge-

ment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same, as this state, by a law passed on the general demand of its citizens, had already protected them from all human restraint or interference; and that in addition to this general principle and express declaration another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, 'that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press,' thereby guarding in the same sentence and under the same words the freedom of religion, of speech and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods and defamations, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. That, therefore, the act of the Congress of the United States passed on the 14th day of July, 1798, entitled 'An Act in addition to the act for the punishment of certain crimes against the United States,' which does abridge the freedom of the press, is not law, but is altogether void and of no effect" (Vol. 7—Ford's Compilation of the Writings of Thomas Jefferson, page 294).

The test is not whether the matter is true or false, or the motive good or bad. Intention has nothing to do with it. Congress can no more con-

trol the discussion appearing in the press, than can the sermon preached in the church.

6. THE VIRGINIA RESOLUTIONS OF D CEMBER 21, 1798, AND THE VIRGINIA R PORT OF 1799-1800.

A few days after the passage of the Kentuc resolution quoted above, the Virginia House of D egates passed a resolution of similar import, b which also contained much other matter and so language which was construed as a threat of sece sion if the Federal Government continued wh was looked upon as a policy of usurpation of po er. This called forth some criticism from oth states. Subsequently, and in 1799 and in 1800, t Virginia House of Delegates in a report, reviewe the criticisms that had been passed upon the re olutions of December, 1798, and for the purpose this discussion, I refer to the resolutions and r port together.

(See publication of Debates and Proce ings on said resolutions and report, W. Randolph, Richmond, Va., 1850).

I quote from the above report, pages 219-220:

"2. The next point which the resolution r quires to be proved, is, that the power ov the press exercised by the sedition-act, is po itively forbidden by one of the amendments the Constitution.

The amendment stands in these words"

(Here the First Amendment is quoted

"In the attempts to vindicate the 'seditio act,' it has been contended,

1. That the 'freedom of the press' is to be determined by the meaning of these terms in the common law. 2. That the article supposes the power over the press to be in Congress, and prohibits them only from *abridging* the freedom allowed to it by the common law.

Although it will be shown, in examining the second of these positions, that the amendment is a denial to Congress of all power over the press, it may not be useless to make the following observations on the first of them.

It is deemed to be a sound opinion, that the sedition act, in its definition of some of the crimes created, is an abridgment of the freedom of publication, recognised by principles of the common law in England.

The freedom of the press under the common law is, in the defenses of the sedition-act, made to consist in an exemption from all *previous* restraint on printed publications, by persons authorized to inspect and prohibit them. It appears to the committee, that this idea of the fredom of the press, can never be admitted to be the American idea of the freedom of it; since a law inflicting penalties on printed publications, would have a similar effect with a law authorizing a previous restraint on them. It would seem a mockery to say, that no law should be passed, preventing publications from being made, but that laws might be passed for punishing them in case they should be made.

The essential difference between the British Government, and the American constitutions, will place this subject in the clearest light.

In the British government, the dan
encroachments on the rights of the peo
understood to be confined to the ex
magistrate. The representatives of the
in the legislature, are not only exempt
selves, from distrust, but are consider
sufficient guardians of the rights of thei
stituents against the danger from the
tive. Hence it is a principle, that the
ment is unlimited in its power; or, in
own language, is omnipotent. Hence, t
the ramparts for protecting the rights
people, such as their magna charta, the
of rights, &c., are not reared against th
liament, but against the royal prerog
They are merely legislative precau
against executive usurpations. Under
a government as this, an exemption o
press from previous restraint by licenser
pointed by the king, is all the freedom
can be secured to it.

In the United States, the case is altog
different. The people, not the govern
possess the absolute sovereignty. The le
ture, no less than the executive, is under
tations of power. Encroachments are re
ed as possible from the one, as well as
the other. Hence, in the United States
great and essential rights of the people a
cured against legislative, as well as ag
executive ambition. They are secured, n
laws paramount to prerogative, but by
stitutions paramount to laws. This sec
of the freedom of the press requires, th
should be exempt, not only from previou

straint by the executive, as in Great Britain, but from legislative restraint also; and this exemption, to be effectual, must be an exemption not only from the previous inspection of licensers, *but from the subsequent penalty of laws.*

The state of the press, therefore, under the common law, cannot, in this point of view, be the standard of its freedom in the United States."

The report then proceeds at great length to show the condition of the press in England and in America, prior to the adoption of the Constitution, and points out that in this country far greater freedom had ever been exercised "in canvassing the merits and measures of public men of every description" than in England, and that such freedom had been in no way confined to the limits of the common law. It further shows that whatever power existed over the press to punish its abuse or licentiousness, rested with the States and could be exercised by the States alone, and that when the Federal Congress by express declaration in the Constitution was prohibited from abridging freedom of speech or of the press, it was meant to deprive Congress of all power on the subject, precisely as it was meant by the same amendment to prevent Congress from making any law interfering with the free exercise of religion. The report then recalls that when the amendments were presented to the First Congress by Mr. Madison, they were introduced with the statement, among others that they were intended to prevent "abuse of its powers" on the part of the Federal Government. I quote again from the report (page 224):

"Is then the federal government, it
asked, destitute of every authority
straining the licentiousness of the pre
for shielding itself against the libell
tacks which may be made on those v
minister it?

The Constitution alone can answ
question. If no such power be express
gated, and it be not both necessa
proper to carry into execution an
power; *above all, if it be expressly fo*
by a declaratory amendment to the C
tion, the answer must be that the
Government is destitute of all such auth

The report then proceeds with an argum
long to quote, to demonstrate the absolu
rectness of the position taken. I respectfu
vite the Court's attention to the entire ar
and report.

7. ALL PERSONS CONVICTED UNDE
SEDITION ACT, WERE PARDONED,
ALL FINES COLLECTED WERE RETU
ON THE GROUND THAT THE LAW WA
CONSTITUTIONAL AND VOID.

The above stated fact is well known, and
not dwell upon it further than to quote
statement from Mr. Jefferson, and the res
of the Congress which completed the return
fines imposed under the law. Mr. Jeffer
writing to Mrs. Adams, June 22, 1804, in
to criticisms concerning his action in par
all persons convicted under the Seditio
said:

"I discharged every person under punishment or prosecution under the Sedition Law, because I considered and now consider that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image; and that it was as much my duty to arrest its execution in every stage, as it would have been to have rescued from the fiery furnace those who should have been cast into it for refusing to worship their image. It was accordingly done in every instance without asking what the offenders had done or against whom they had offended, but whether the pains they were suffering were inflicted under the pretended Sedition-Law."

(Vol. 8, Ford's Writings of Jefferson, page 309.)

The last record I find of the return by Congress of the fines collected under the Sedition Law, is the case of Dr. Cooper. On January 29, 1850, Mr. James Thompson from the Committee on the Judiciary, made a report setting forth the conviction of Dr. Cooper under the Sedition Law, the fact of his death, and the appointment of his executor, and that in the opinion of the Committee, the Alien and Sedition Law,

"was unconstitutional, null and void, and passed under the exercise of undelegated power by Congress; that the fine so levied ought to be refunded to the heirs and legal representatives of said Dr. Cooper with interest thereon until paid."

The report further sets forth that similar action had been taken in a number of other cases. The resolution passed the house March 15, 1850, the Senate July 18, 1850, and was approved. (See House Journal, 1st Session, 31st Congress, 1849-50, page 1141; also House Journal, 1st Session, 31st Congress, page 675.)

One other fact remains to be stated in this connection. The report of the Virginia House of Delegates of 1799-1800, from which I before quoted so liberally, was made a campaign document in Mr. Jefferson's campaign for the presidency at that time. By resolution of the House of Delegates of Virginia, of Jan. 20, 1800, five thousand copies of the report were ordered printed for circulation, and there were a number of reprints of the report in New York and elsewhere for use in the campaign. Mr. Jefferson's election by the people and the overwhelming defeat of his opponents was a clear declaration by the people at that time that they approved his views as to the unconstitutionality of the old edition Law, and the action of Congress, session after session, refunding fines paid under it down to 1850, shows clearly that at least until that date, the sentiments of the people on the subject was unchanged.

8. DISCUSSION BY PROFESSOR TUCKER IN NOTE TO BLACKSTONE'S COMMENTARIES.

In 1803 an edition of Blackstone's Commentaries was published in Philadelphia and edited by Prof. St. George Tucker. Prof. Tucker was, for a time, professor of law in the College of William and Mary, and judge of the General Court of Vir-

ginia. In 1804, he was appointed a judge of the Virginia Court of Appeals and in 1813, Judge of the United States District Court of Virginia. The note to which I refer is found as "Note G" to the above edition of Blackstone's Commentaries. The time and circumstances under which the note was written, give it peculiar significance historically, and the learning which it manifests, makes it authoritative for all time. I shall quote only a few paragraphs from it, but the whole note should be carefully studied by anyone desiring to understand the origin and significance of the first amendment. In opening the discussion of the free speech and free press clause of the Constitution, he says:

> "Liberty of speech and of discussion in all speculative matters, consists in the absolute and uncontrollable right of speaking, writing, and publishing, our opinions concerning any subject, whether religious, philosophical, or political, and of inquiring into and, examining the nature of truth, whether moral or metaphysical; the expediency or inexpediency of all public measures, with their tendency and probable effect; the conduct of public men, and generally every other subject, without restraint, except as to the injury of any other individual, in his person, property, or good name."

The foregoing, as Prof. Tucker shows, and as the documents I have hereinbefore quoted also show, constituted the conception of free speech embodied in the first amendment.

Referring to the licensing acts of England, he says:

> "In 1694, the parliament refused to continue these prohibitions any longer, and thereby, according to De Lolme, established the freedom of the press in England. But although this negative establishment may satisfy the subjects of England, the people of America have not thought proper to suffer the freedom of speech, and of the press to rest upon such an uncertain foundation, as the will and pleasure of the government."

He then proceeds with the historical discussion to show that in this country, at least, freedom of speech and of the press meant absolute freedom for the discussion of measures of government. In case of injury to *private* reputations, the action for libel or slander, of course, was always open. I quote again:

> "This security of the freedom of the press requires, that it should be exempt, not only from previous restraint by the executive, as in Great Britain; but from legislative restraint also; and this exemption, to be effectual, must be an exemption, not only from the previous inspection of licencers, *but from the subsequent penalty of laws.*"

After stating the argument to show that the first amendment was intended to deprive the Congress of any power over the press, it is said:

> "That under any other construction of the amendment relating to the press, than that it declared the press to be wholly exempt from the power of Congress * * * the amendment

> could neither be said to correspond with the desire expressed by a number of the states, nor be calculated to extend the ground of public confidence in the government."

In closing his discussion, Prof. Tucker defines free press as follows:

> *"Every individual, certainly, has a right to speak or publish, his sentiments on the measures of government; to do this without restraint, control, or fear of punishment for so doing, is that which constitutes the genuine freedom of the press."*

As to the power of Congress in the matter, he further says:

> "It was therefore made a fundamental article of the federal compact, that no such power (legislating respecting freedom of speech and of the press) should be exercised, or claimed by the federal government; leaving it to the state governments to exercise such jurisdiction and control over the subject, as their several constitutions and laws permit."

In Gulf, etc., vs. Ellis, 165 U. S., 160, this court said:

> "It is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure the equality of right which is the foundation of free government."

The Declaration of Independence provides that "whenever any form of government becomes destructive of these ends, *it is the right of the people to alter or abolish it.*" Clearly, freedom of speech and of the press meant to the Fathers of the Constitution the right to discuss every act of the government, whether to praise, condemn or threaten. It would be a simple matter to show, if space permitted, that in every war in which this country has been engaged, the people discussed with absolute freedom, and without attempt to impose any penalty by the federal government, every feature of the war, its causes, the manner of conducting it, its proper objects and its improper ones, and they freely criticised and condemned the President and the Congress for their acts in conducting these wars. For the first time in all our history, this constitutional right has been denied and the federal government has virtually silenced all critical or hostile discussion of war policies. It matters not in what form this was accomplished, *the fact* remains that it has been done and it is with that fact that people of this country are concerned. It is that fact which calls upon this court to re-establish the faith of the people of this country in their constitution and its guarantees of free speech and free press. I am aware that it is not for the court to consider the policy of its decisions but only to truthfully interpret the constitution, but I have no hesitation in saying that no victory won by our army, in this war, and no success which our diplomacy may obtain, will arouse the patriotism and loyalty of the people of this country, as will the declaration from this court that the Constitution of the United States protects the people everywhere in their traditional rights to freely speak and pub-

lish their sentiments, and that the Congress of the United States cannot by any device interfere with that right.

Unless I am right in the contentions made in this brief, unless as Professor Tucker says, and as Jefferson, Madison and the other men of that day responsible for this amendment declared, "freedom of the press" means that every individual *"has a right to speak or publish his sentiments on the measures of government; to do this without restraint, control or fear of punishment for so doing,"* then the free speech and free press clause of the Consttution is *absolutely valueless.* Today, the railroads are being operated and controlled by the Federal Government. The post office is at all times so operated and controlled. Suppose Congress should pass a law providing that whoever shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the railroads while controlled by the government, or of the post office or post roads, or whoever shall wilfully cause or attempt to cause insubordination or refusal of duty on the part of the railway employees or the postal employees, or shall wilfully obstruct the recruiting or employment by the United States of men for the postal service, or for the railroads, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than twenty years, or by both. If Section 3 of Title I of the Espionage Law is constitutional, then a law such as I have above suggested is constitutional. If Section 3 of Title I of the Espionage Law prevents general public discussion of the war, its causes and objects, its wisdom or its folly, because a jury is allowed to find that such discussion is with the specific *intent* prohibited by the Espionage Law, then similarly

a discussion of the causes and effects of railr
operation by the government, its wisdom or
folly, can in the same way and by the same dev
be suppressed. Just as soon as a jury is permit
to penalize public discussion of the measu
of government, because of the *intent* which
jury may find animated the discussion, or
results which the jury is permitted to find (in
absence of all evidence of any specific result), su
discussion caused, then the constitutional gu
antee of free speech and free press is wiped o
If the war power of Congress can be used to p
vent discussion of war, then the power of Congr
to coin money can be used to suppress discuss
of the currency, and so on with every other
the express powers of Congress. Once this co
says that public discussion of the measures
government can be punished because of any *int*
which a jury may find caused the discussion,
because of any result which a jury may think w
follow such discussion, then the free speech a
free press of the Constitution is destroyed. T
same device, the same machinery can be employ
in the same manner to suppress discussion up
all measures of government.

Once the vicious principle above stated is a
mitted, there is no place to stop, no place to dra
the line. As good reasons will be put forward f
an Espionage Law in peace as can be put forwa
in time of war. In fact, such a law will be justifi
in time of peace, as necessary to prevent the
citement by licentious discussion, which might le
to war.

The court has but to read the speeches of We
ster, of Clay, of Calhoun, of Sumner, of Linco
and other patriots, whose names are inseparab

connected with the history of this country's achievements, to see that no consideration of interference with military or naval operations or the discipline of the army, or the recruiting of the army, ever deterred them for a moment from condemning in unmeasured terms, not only the war policies of the government, but the right and justice of the government in engaging in the war then under discussion. The speeches of these men were made sometimes in Congress, often on the public platforms, and during the most critical periods of the wars discussed. Read the Democratic platform of 1864, upon which George B. McClellan was a candidate for the presidency, and compare it with anything that the Socialists have said during the present war. Read DuParcq's Life of Lloyd George, and compare the ghastly charges which he made against his own government in its conduct of the Boer War, and made in the very height of that war, with the wildest or most foolish things that anyone has said concerning the present war.

It is no answer to say that there was no Espionage Law in this country during our other wars. It was universally believed at that time, that the freedom of speech and of the press, guaranteed by the Constitution, protected and justified such discussion—nay, made it a duty on the part of those who believed that their government was wrong in its war policies.

In this imperfect and most hastily prepared brief, I have been able only to suggest the sources of information where the real meaning, scope and purpose of the First Amendment will be found, and I shall be repaid for the labor of preparing it, if it proves to be even of some small service in guiding the court to these sources of information.

POINT III.

Section 3 of Title I of the Act June 15, 1917 (commonly known the Espionage Law), is unconsti tional, as it has been construed a applied, in that it violates the fi and sixth amendments to the con tution.

I do not find from the record in the present c that the above objection was specifically taken. will doubtless appear, however, in many of cases coming before this court involving Sectio of Title I of the Espionage Law and I merely r to it. The first element of "*due process of law*" course, is that there shall be a "*law.*" It is a miliar maxim that where the law is uncert there is no law (Black's Law Dictionary, p 1181). As Mr. Justice Brewer said in *Washing & Northwestern R. R. Co.* vs. *Day,* 35 Fed., 8 876:

> "No penal law can be sustained unless mandates are so clearly expressed that ordinary person can determine in adva what he may and what he may not do un it."

The right to "be informed of the nature cause of the accusation," requires that:

> "In a criminal statute, the elements con tuting the offense must be so clearly sta and defined as to reasonably admit of

one construction. Otherwise there would be lack of uniformity in its enforcement."

U. S. vs. Capitol Traction Co., 34 App. Cases, Dist. Col., 592, 598.

In the case last cited, it is also said:

"The dividing line between what is lawful and unlawful must not be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime and the elements constituting it, must be so clearly expressed, that the ordinary person can intelligently choose in advance what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for a violation, should not admit of such double meaning that the citizen may act upon one conception and the courts upon another."

See also:

Czarra vs. Board of Medical Supervisors, 25 App. Cases, Dist. Col., 443.
U. S. vs. Reese et al., 92 U. S., 214.

Respectfully submitted,

GILBERT E. ROE,
As *Amicus Curiae.*

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